Petition

81-2059

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY J. SCHERER, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Fourth Amendment prohibition against unreasonable searches and seizures violated by an undercover agent's entry upon one's lands in the owner's absence, to make knowing and intended search(es), through consent obtained by misrepresentation and deceit, when the owner does not contemplate any criminal activity and no actual criminal activity takes place during the search(es)?

2. Can the Government tell persons that they may sell "personal" guns without recording them and then convict them of selling guns without recording them and not allow him to introduce evidence to show those guns were personal?

3. Does the use of knowing perjured testimony by a Government agent require a new trial?

4. Does the suppression of documents which would allow effective cross-examination of a Government agent and show testimony to be perjured and additionally materially weaken his credibility, require a new trial?

5. Upon the Motion for a Writ of Error Corum Nobis, is the standard for relief higher than that for relief on a direct appeal when the misconduct and suppressions are the acts of the prosecutors?

6. Has the Petitioner met the standards for a Writ of Error Corum Nobis?

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OPINION BELOW

The Opinion of the Court of Appeals will be published in full and is printed as Appendix "A", and was entered on January 26, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order entered on March 1, 1982 (Appendix C). The Opinion of the District Court was entered on March 3, 1981 (Appendix H).

JURISDICTION

The Judgment of the Court of Appeals was entered on January 26, 1982 (Appendix B). A timely petition for Rehearing and Suggestion for Hearing En Banc was denied on March 1, 1982 (Appendix C).

The Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV:

"The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

I.

GENERAL BACKGROUND

Anthony J. Scherer was a federally licensed gun dealer. Pursuant to an investigation as to his activities, many informants were sent by the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms (B.A.T.F.) to investigate Scherer.

After a search of his property on October 4, 1972, pursuant to a search warrant, Mr. Scherer was charged with certain offenses; failure to record several firearms on his book of records and to make out Federal Forms, possession of machine guns, and failure to record the acquisition of certain guns. Of eleven (11) Counts, one was dismissed and there was a finding of not guilty on one. There was a finding of guilty as to Counts 1 – 9. The United States Court of Appeals affirmed that conviction, 523 F.2d 370(7th Cir., 1975). This Court declined to hear the matter.

Thereafter, Mr. Scherer, through the Freedom of Information Act and two (2) still pending civil cases, was able to get new evidence pertaining to his case. A Petition for a Writ of Error Corum Nobis was filed and denied.

MATERIAL FACTS

On September 20, 1972 and again on September 23, 1972, a Government informer and a B.A.T.F. agent (under an assumed name and calling himself the informant's cousin "Jim Moore") entered upon Petitioner's land. They came to make a search of Petitioner's barn for certain items thought to be contraband by the informant. They told Petitioner they wanted to use his property for hunting and building duck blinds. Petitioner, who never met the B.A.T.F. agent, has been continually investigated by B.A.T.F. agents since 1964. Petitioner gave permission to the informant and the B.A.T.F. agent to use his land for hunting and building duck

blinds. On both occasions when the informer and the agent came upon the property, Petitioner was not home.

During the two separate searches of Petitioner's barn, the agent inspected and handled the two items thought to be contraband, as per the informant's information. The items were in the same place where the informant had told the agent he had seen them. The items were thought to be Thompson sub-machine guns and thus illegal. The "discovery" of the items by the agent led to a search warrant, the only search warrant, which led to Petitioner's conviction. The "sub-machine guns" in fact were replicas, inoperable and legal.

Exhibit 30, at trial, dated October 5, 1972 and made by a B.A.T.F. agent contains an entry for October 12, 1972. Years lated, the original documents which were used to prepare Exhibit 30 were shown to Mr. Scherer for the first time. Dates, times and facts are changed.

The highest official of the B.A.T.F., in 1979, wrote to United States Senator Hayakawa that a gun dealer may sell his personal firearms without recording them. At his trial, Petitioner cited a circular of the Treasury Department that personal firearms need not be entered in the dealer's records. Petitioner desired to show that the guns he was convicted of not putting in his records were personal guns. The Court of Appeals held the issue, originally on the direct appeal and on this appeal, to be immaterial.

REASONS FOR GRANTING WRIT

INTRODUCTION

The Petitioner argues the following reasons why this Petition for Writ of Certiorari should be granted:

1. The decision below raises the significant and recurring question of whether the Fourth Amendment has any importance or whether the Government can always, by subterfuge, find a way around the protections of that Amendment. It also raises questions as to knowing suppressions of documents and perjured testimony by Government agents.

2. The decision also raises the significant and recurring question of the standard for a Writ of Error Corum Nobis when the misconduct is that of the prosecution.

3. The decision below is incorrect as it only encourages Government subterfuge and other misconduct and signals an end to the protections of the Fourth Amendment, and is the death of the Writ of Error Corum Nobis.

ARGUMENT

The Court of Appeals held that an "agent may obtain an invitation onto the property by misrepresenting his identity, and, if invited, does not need probable cause nor warrant to enter so long as he does not exceed the scope of his invitation" (Slip Opinion at 10) and the "fact that the agents were aware before the visit that the two (guns) were (in Petitioner's) barn does not take this case out of the consent except to the Fourth Amendment's warrant requirement" (at 10). The decision relied on Lewis vs. United States, 385 U.S. 206, 212 (1966) and United States vs. Glassel, 488 F.2d 143, 145 (9th Cir., 1973).

The decision is but another nail in the coffin of the Fourth Amendment. Despite the fact of (a) a knowing search, (b) trickery, (c) permission to do only lawful acts, (d) no criminal acts of the Petitioner, (e) no presence of the Petitioner and (f) a second search three days after the first, no search warrant is required. The decision allows and more importantly encourages agents to trick persons into loss of Constitutional Rights. Government agents will now always take the easy way around the Fourth Amendment and trick someone into "consent". It means that no person can ever allow anyone into his house without fear of loss of Fourth Amendment protections. The "Government need never satisfy the probable-cause and warrant requirement of the Fourth Amendment if, by disquising its officers as repairmen, baby sitters, neighbors, maids and the like, it is able to gain entry into an individual's home by use rather than force in order to conduct a search", Baldwin vs. United States, 450 U.S. 1045 (1981), Justice Marshall dissenting from the Denial of Certiorari at 1049. See also United States vs. Baldwin, 632 F.2d 1 (6th Cir., 1980, dissent from denial of Petition for Rehearing) and Oral Argument, United States vs. Scherer, 79–1342 May 12, 1982 (App. 1g) remarks of Judge Swygert (the issue though Briefed by both sides was not decided in that decision, which led to this Petition for Relief to the District Court on this issue).

Thus, no person could live with anyone (of either sex) else, he would "waive" his Fourth Amendments rights,

United States vs. Baldwin, 621 F.2d 251 (6th Cir., 1980). No person could have an item in his house which required in-home repair, no person could rent an apartment and leave a key with the landlord, no person could invite a friend over (this case). In short, every citizen, to preserve his Fourth Amendment rights, must give up the Constitutional right to associate with others, and generally enjoy life and liberty.

Petitioner did not allow the agent to come upon his property for the purpose of conducting an illegal act thus clearly distinguishing the only two relied on cases, Lewis, supra, and Glassel, supra.

In Gouled vs. United States, 255 U.S. 298 (1921) this Court said that when entrance into a home is obtained by the Government by trickery, any secret search is prohibited by the Fourth Amendment. This Court must clarify the law of today as it applies to a knowing search(es), where "consent" is gotten by trickery and the expectation of the consentor is that the agent will only be doing legal acts. The Court must tell the citizens of this land whether the Fourth Amendment protects them from Government searches. The Courts of Appeal, as shown especially by this case and Baldwin, have held that a search warrant is only necessary when the Government can't get what it wants through tricks. Why then should an agent ever go and ask for a search warrant which might be refused by a neutral and detached magistrate? The agent only has to dream up a scheme, with no restrictions, which will play into that person's personality (weakness). To a sloppy or busy person they can knock on the door and offer cleaning services. To person with young children they can offer babysitting services at cheap (below market) rates. To business they can offer help (Baldwin). Every person must have contact with other persons. Every time he does, though he expects only to do legal acts with the other person, he takes a chance that the other person will search the house for incriminating evidence. This would be so even if the agent knew what and where the item was. If the Court wants to overrule Gouled, it should openly do so. Under the Courts of Appeals decision, no warrant would ever be necessary. Petitioner challenged

the Seventh Circuit to state when a warrant would be needed (Petition for Rehearing, February 9, 1982). The Court's silence says it all.

In his direct appeal, Petitioner argued that the guns which led to his conviction for sales without recording them were "personal" and not "business" guns and thus not required to be recorded. The Seventh Circuit held that, despite Treasury Department Industry Circular 72–30 which stated that "Personal firearms . . . need not be entered in the dealers' records", the issue was immaterial, Scherer I, 523 F.2d at 374. Now many years later, the highest official of BATF, in 1979, wrote to Senator Hayakawa that a gun dealer may sell his personal firearms without recording them. How can this be if it is "irrelevant" to criminality? Then and still now the BATF continues to entrap dealers into criminal acts. Petitioner has never been given the chance to prove that the guns were personal and not business items since such was "immaterial". Petitioner merely seeks the chance and right to establish that these specific items were held in a manner which would not show that his actions were an attempt to circumvent the law, see United States vs. Currier, 621 F.2d 7 (1st Cir., 1980) relied on by the Seventh Circuit herein. BATF is, and was, telling the dealers and U.S. Senators that they can sell personal guns without recording them, yet no Court has allowed a Defendant to even try to show that he treated certain guns differently and that the differences show that certain guns were personal.

The Government used, at trial, a document which was perjured. Exhibit 30, made by the BATF agent, at the trial was dated October 5, 1972 yet miraculously detailed events of October 12, 1972. The perjury inherent in Exhibit 30 could not be effectively used at trial because in that entry detailing events of October 12, 1972, Petitioner's attorney is called a shyster by his co-Defendant, being represented by the same attorney. It also states that the co-Defendant offered to help the Government convict this Petitioner in return for $5,000.00. Thus, Petitioner's counsel was faced with a situation where one of his clients had offered to sell out to the other side, and actively work towards the conviction of his other client. In order to point out the perjury of the agent he would necessarily have to highlight his being called a

"shyster" by one of his clients and also reveal that his clients were antagonistic. He had a conflict of interest and in his desire to keep two clients, and two fees, and to prevent the Court from hearing that his client was offering to switch sides, trial counsel stayed far away from Exhibit 30 despite its obvious falseness. Five years later, newly discovered evidence shows that Exhibit 30 was a composite document made from other reports of the agent. The Court of Appeals found four differences in the documents (Op. at 5). The newly discovered documents show that times and dates were changed and facts were omitted and added. The new documents do not mention trial counsel's other client offering to sell Petitioner out nor do they call the attorney a shyster (Where are the originals of those reports?) So if produced at trial, counsel could have used them to point out that the agent easily interchanged dates and times and facts and that Exhibit 30 was perjured and thus that the agent was committing perjury. The agent could have written up his notes into Exhibit 30 knowing that the events of October 12, 1972 would prevent counsel from using anything in the documents. The Government had the newly discovered documents in its possession (that is where they were found 5 years later). Thus the Seventh Circuit allows the knowing use of perjured and incorrect testimony despite the line of cases from Hysler vs. Florida, to testimony which holds that such trials are incompatible with out standards of justice. The importance of this Court's earlier decisions protecting Defendants from prosecutional misconduct requires review. Even if material only affected the agent's credibility it would require a new trial when material, as here, because this agent was the one whose affidavit led to the later search warrant and he also spearheaded the investigation against this Petitioner, see Napue vs. Illinois, 560 U.S. 264 (1959).

Upon these facts, a Writ of Error Corum Nobis should be granted. In the cases relied on for the holding that there must be a stronger showing then presented here for relief, the prosecutors were innocent of wrongdoing. It is not that a juror lied during voir dire, United States vs. Mayer, 235 U.S. 55 (1914), it is not that there was a change in parole policy, United States vs. Addonizio, 442 U.S. 178 (1978); it is not from the trial itself, United States vs. Dellinger, 657 F.2d

140 (7th Cir., 1981). Rather Petitioner complains that those who prosecuted him, perjured themselves, withheld material evidence, violated his Fourth Amendment rights, and told him that what he was doing was lawful, all fundamental rights. See Giglio vs. United States, 405 U.S. 150 (1972), Pointer vs. Texas, 380 U.S. 400, 403 (1965), Davis vs. Alaska, 415 U.S. 308, 318 (1974), Payton vs. New York, 445 U.S. 573, 590 (1980), United States vs. Chianzio, 525 F.2d 289, 294 (2nd Cir., 1975).

Though the Court of Appeals talks about the requirement of "due diligence" in discovering the suppressed documents, it surely cannot say that this Petitioner, who has filed two actions seeking to overturn his convictions, filed a F.O.I.A. suit and a civil rights suit (79–3686, N.D. Ill. E.D. currently pending), has not been as diligent as could be in seeking those documents and in seeking reversal of the blot on his reputation.

CONCLUSION

To determine whether the Fourth Amendment will continue to protect persons or whether the Government will be allowed and encouraged to trick its way around it, to determine whether the Government can suppress documents which highlight perjury and allow for effective cross-examination, and to determine why the Government continues to entrap its citizens by telling them they can sell personal guns and then convict them of doing it, and to determine whether the Government can profit from its misdeeds by requiring a stronger standard of proof for a new trial after the sentence has been served, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the United States Attorneys Office at 219 South Dearborn Street, Chicago, Illinois this 28th day of April, 1982.

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Appendix

Appendix 1A

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1408
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ANTHONY SCHERER, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-CR-99–James B. Parsons, *Senior District Judge.*

ARGUED OCTOBER 2, 1981–DECIDED JANUARY 26, 1982

Before SPRECHER and WOOD, *Circuit Judges,* and BROWN, *Senior District Judge.* *

WOOD, *Circuit Judge.* Defendant-appellant, Anthony J. Scherer, Jr., appeals from the order of the district court, which denied a petition to vacate his conviction for certain violations of the Gun Control Act of 1968.[1]

I.

In 1974, Scherer was found guilty of nine counts of failure to record the disposition of firearms in violation of

* The Honorable Wesley E. Brown, Senior District Judge of the United States District Court for the District of Kansas, is sitting by designation.

[1] 18 U.S.C. § 922(m).

the Gun Control Act, and was sentenced to concurrent two-year terms for each count. This court affirmed. *United States v. Scherer,* 523 F.2d 371 (7th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976) *(Scherer I).* In 1976, the trial court granted defendant's motions for reduction of sentence with the result that Scherer's incarceration lasted from March 19 to May 26, 1976, followed by a three year period of probation which expired on May 17, 1979. In July, 1978, while still on probation, Scherer petitioned the trial court for habeas corpus relief under 28 U.S.C. § 2255, alleging violations of his Fourth, Fifth, and Sixth Amendment rights. The district court denied the petition, and this court affirmed in an unpublished order. *United States v. Scherer,* No. 79-1342 (7th Cir. May 21, 1980), *cert. denied,* 449 U.S. 873 (1980) *(Scherer II).*

Scherer again petitioned the trial court in June, 1980, seeking to have his conviction vacated. He based the petition on Fed. R. Crim. P. 35, for correction of an illegal sentence; 28 U.S.C. § 2255, as a petition for habeas relief; the All Writs Act, 28 U.S.C. § 1651, as a petition for a writ of error *coram nobis;* and the common law writ of error *coram nobis.* Scherer argued that newly discovered evidence, not disclosed to him by the government at trial, recently came to light pursuant to discovery conducted in a related civil forfeiture action, *United States v. Misc. Firearms,* No. 74 C 877 (N.D. Ill., filed March 28, 1974).[2] Scherer claimed that this new evidence showed that perjured evidence was used against him at trial, that the act for which he was convicted was not a crime, and that several warrantless searches of his property in 1972 were unlawful under the Fourth Amendment. He also included several other allegations of irregularity in the events leading to his arrest and prosecution. Scherer asserted that this new evidence demonstrated a fundamental flaw in his trial and warranted vacating his conviction.

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[2] The district court in *Scherer II* did not consider the alleged new evidence and we refused to consider it on appeal because the evidence was not presented to the district court. *Scherer II,* No. 79-1342, slip op. at 5 (7th Cir. May 21, 1980).

The district court, finding Fed. R. Crim. P. 35[3] and 28 U.S.C. § 2255[4] inapplicable, treated Scherer's petition as one for a writ of error *coram nobis.* On March 3, 1981, the court denied relief, finding that Scherer's new evidence failed to demonstrate such fundamental error in the proceedings against him as to warrant the granting of the writ and vacating his conviction. Scherer appealed to this court.

II.

In its modern treatment, the writ of error *coram nobis* is available in a criminal rpoceeding and is of the same general character as habeas corpus relief under 28 U.S.C. § 2255. *United States v. Morgan,* 346 U.S. 502, 506 n.4 (1954); *United States v. Keogh,* 391 F.2d 138, 140 (2d Cir. 1968). The writ will not lie for every error discovered after judgment. It is an extraordinary remedy and may be used to vacate a judgment of conviction "for errors of fact . . . where the errors (are) of the most fundamental character, that is, such as render the proceeding itself irregular and invalid." *United States v. Addonizio,* 442 U.S. 178, 186 (1979); *United States v. Mayer,* 235 U.S. 55, 69 (1914); *United States v. Dellinger,* 657 F.2d 140, 144 (7th Cir. 1981). *Coram nobis* review may offer a unique possibility of relief since, unlike § 2255 habeas relief, it remains available to a defendant after he has been released from custody. *United*

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[3] The district court found that Fed. R. Crim. P. 35 was inapplicable because the Rule has been construed "(t)o permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence." *Hill v. United States,* 368 U.S. 424, 430 (1962). Scherer does not claim that his sentence was not in conformity with the statue under which he was convicted. Moreover, the petitioner has not complied with the 120 day time period for filing under Rule 35(b).

[4] The district court found 28 U.S.C. § 2255 inapplicable because Scherer failed to satisfy the custody requirement. He has completed both his sentence and his period of probation. *Ansourian v. United States,* 240 F.Supp. 864 (S.D.N.Y. 1965), *cert. denied,* 383 U.S. 949 (1966).

States v. Dellinger, 657 F.2d at 144; *United States v. Balistrieri*, 606 F.2d 216, 220 (7th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). It is presumed that the proceedings leading to conviction were correct, and the burden is on the petitioner to demonstrate that "the asserted error is jurisdictional or constitutional, (and) involves an error of law that results in a complete miscarriage of justice." *Morgan*, 346 U.S. at 512; *United States v. Hedman, et al.*, 655 F.2d 813, 815 (7th Cir. 1981). To the extent that the petition is based on newly discovered evidence, the defendant must also show that due diligence on his part could not have revealed the evidence prior to trial. *Hedman*, 655 F.2d at 814. Further, the new evidence must be such that, if known at trial, it would have allowed the defendant to present his case in a manner which would have likely led to a different result. *Keogh*, 391 F.2d at 148; *Bateman v. United States*, 277 F.2d 65, 68 (7th Cir. 1960).

III.

Scherer argues that certain documents, undisclosed by the government at trial, but recently revealed by discovery in a related civil case, demonstrate fundamental error calling for *coram nobis* relief. The first of these documents consists of a four page affidavit from a Bureau of Alcohol, Tobacco and Firearms ("BATF") agent. The newly discovered document appears to contain the original notes of Trial Exhibit 30, which was offered and admitted at trial. Scherer contends, however, that Exhibit 30 is a perjured document since it is dated October 5, 1972, but describes an event of October 12, 1972. Moreover, while Exhibit 30 is dated October 5, 1972, the newly discovered document has a December 11, 1972 date crossed out with "October 5, 1972" inserted.[5] Scherer

[5] Other discrepancies that Scherer cites are:

1) On the second page of the newly discovered documents, the date crossed out of the statement is September 25, 1972.

2) A time was changed from 12:00 to 11:30.

3) Facts contained in one document are omitted in the other documents and vice versa.

contends that he was prevented from effective cross-examination because he could have used the document to cross-examine a BATF agent.

While some differences do exist between the two documents, we agree with the district court that there are "no substantive differences which would have prejudiced petitioner at trial." *United States v. Scherer,* No. 74 CR 99 at 5 (N.D. Ill. March 3, 1981) *(Scherer III).* The existence of minor differences does not amount to perjury. *Anderson v. United States,* 403 F.2d 451 (7th Cir. 1968), *cert. denied,* 394 U.S. 903 (1969); *United States v. Spadafora,* 200 F.2d 140 (7th Cir. 1952). Moreover, Scherer's contention that the date discrepancy could have been used for cross-examination purposes fails. Exhibit 30, dated October 5 and containing a description of events on October 12, was available at trial. Therefore, defendant's discovery of the discrepancy on the newly discovered document brings no new significant facts to this case and does not warrant *coram nobis* relief.

Moreover, Scherer argues that his trial attorney probably did not make effective use of Exhibit 30 for impeachment purposes because the document contains a reference to his attorney as a "shyster" and relates events which Scherer claims reveal a conflict of interest on the attorney's part. If the newly discovered document had been available at trial, he asserts, more effective cross-examination may have been possible, since the newly discovered document does not contain these references. Even if it was clear how the newly discovered document could be effectively used for impeachment purposes, Scherer overlooks the principle that new evidence which is merely impeaching is not grounds for granting a new trial. *See Hedman,* 655 F.2d at 815; *United States v. Robinson,* 585 F.2d 274, 278 n.4 (7th Cir. 1978) *(en banc), cert. denied,* 441 U.S. 947 (1979). Further, defendant does not cite the contents of the document as evidence of any new information, nor does he show that it is material to the issues involved in this case. Speculation as to what probably occurred or what may have been possible does not lead to the conclusion that Scherer's trial was so fundamentally flawed as to constitute a

miscarriage of justice, *Hedman*, 655 F.2d at 815, or that the newly discovered document would have allowed him to present his case in a manner likely to produce a different result. *Bateman*, 277 F.2d at 68. *See United States v. Balistrieri*, 606 F.2d 216, 222 (7th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

Scherer also discovered eleven pages of handwritten notes of unidentified origin in a government file. He urges that since these notes may pertain to his case, he should now have the opportunity to learn who wrote them, when they were made, and whether they contain information which might have been material to his case. It is unclear, however, what argument Scherer is making. If, on one hand, he argues that he should now have the opportunity to discover whether his speculations regarding the notes' relevance to his case are true, a petition for a writ of error *coram nobis* may not be used "to allow a defendant to fish for facts that may or may not exist and may or may not justify the motion in the first instance." *United States v. Balistrieri*, 423 F.Supp. 793, 795 (S.D. Ill. 1976), *aff'd*, 606 F.2d 216 (7th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). If, on the other hand, he argues that his speculations alone—that these pages may refer to him and may contain evidence material to his case—call for vacating his conviction, then Scherer "offer(s) no new evidence at all, but only new suspicions," and "(t)he existence of *some* new evidence is a prerequisite to granting a new trial on the basis of newly discovered evidence." *Hedman*, 655 F.2d at 816 (emphasis in original).

IV.

Scherer next renews an argument he made unsuccessfully on his direct appeal. On direct appeal, he relied on Industry Circular 72–30, released by the Treasury Department in 1972, which provides, "Personal firearms on licensed premises which are segregated from firearms held for sale and which are appropriately identified as not being for sale need not be entered in the dealer's records." Scherer claimed that the weapons seized

were a part of his private collection and were stored in his home rather than his business office. Therefore, he argued, he was exempt from recording their sale or disposition. This court found, however, that "it is immaterial whether the weapons sold were originally acquired for Scherer's personal use or for business purposes. They became a part of his business inventory the moment they were placed on the market for resale." *Scherer I,* 523 F.2d at 374. This holding prevents dealers from easily circumventing the law by accumulating "personal use" weapons to make otherwise unlawful sales. *United States v. Currier,* 621 F.2d 7, 9 (1st Cir. 1980).

In this proceeding, Scherer submits a new document and again urges this court to read a "personal" versus "business" use distinction into the Gun Control Act. Scherer cites a 1979 letter from an official at BATF, which in part describes the Bureau's policy that a gun dealer may sell his personal firearms without recording them. Scherer asserts that his unrecorded sales were of "personal" weapons and that he has thus been convicted of an act which the government does not consider a crime.

No new facts are brought to light, however, which call for a re-examination of our decision on the direct appeal of his case. The 1979 letter merely restates the position outlined in Industry Circular 72–30, and does not overrule our earlier holding. Since no new circumstances appear, and since the issue has been fully argued and decided previously, we see no reason to disturb our previous decision. *United States v. Orejuela,* 639 F.2d 1055, 1057 (3d Cir. 1981).

V.

The third category of Scherer's arguments deals with allegedly unlawful searches of his property by BATF agents. Scherer claims that a newly discovered incident, the warrantless observation of his property in late June or early July, 1972, from a post somewhere northwest of his house, amounted to an unlawful search. With respect to two warrantless entries of his property by an agent in September, 1972,

Scherer asserts that he has recently discovered that the agent, before entering, was aware that two Thompson submachine guns were in his barn. The effect of this awareness, Scherer argues, is to make the searches unlawful under the Fourth Amendment. Further, Scherer contends that the evidence used against him at trial carried the taint of these illegal searches, since the June-July search produced information which led to the issuance of the search warrant pursuant to which evidence was seized and used to convict him. Therefore, he argues, his conviction must be vacated.

The chain of events which Scherer traces between the searches and the seizure of evidence under the warrant is weak. While he asserts that the June-July observation provided information which led to the September searches, he does not point out, and apparently does not know, what that information was. In fact, it appears from other evidence, that the information relayed by an informant after his dealings with Scherer was the underlying reason for the September searches. Moreover, this court held on direct appeal that probable cause existed to support the eventual issuance of the search warrant apart from information gained in the September entries. The information gained in September was merely coorborating. *Scherer I*, 523 F.2d at 376-77. Thus, it is far from clear that the June-July observation resulted in the September searches, and it cannot be said that the September searches led to the issuance of the warrant. The effect of this flaw in Scherer's argument, however, need not be examined, since Scherer failed to show that any of these searches was in violation of the Fourth Amendment.

Scherer cites the deposition of a BATF agent as evidence of government intrusion on his property.[6] The district court noted that

> it appears that the agents set up an observation post . . . which was west-northwest of Mr. Scherer's house.

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[6] The only relevant testimony cited to us is:

> Q: When you say in a fixed position, you just took up a position then on the grounds somewhere, is that it?
>
> A: Yes.

> The agents seem to have been east of an open field . . . No distances are given . . . but the deposition reveals that a railroad track lies west-northwest of the house, and the agents were a *considerable distance from the railroad tracks.*

Scherer III, 74 CR 99 at 9-10 (emphasis added). The Fourth Amendment protects against warrantless intrusions where an individual has a "legitimate expectation of privacy." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978), *citing, Katz v. United States*, 389 U.S. 347, 353 (1967); *Wilson v. Health and Hosp. Corp.*, 620 F.2d 1201, 1208 (7th Cir. 1980). While the home is clearly protected,[7] there is insufficient evidence to find that the surveillance post was on Scherer's property or, if it was, that it was within the constitutionally protected curtilage surrounding his house. *See United States ex rel. Saiken v. Bensinger*, 546 F.2d 1292, 1295-97 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977).

Moreover, Scherer does not show that the observation produced any information useful to or used by the government in prosecuting him. Although Scherer asserts that the agents were looking for "things . . . in the house or right around the house" from this observation post, he fails to show what, if anything, was observed. The results of the surveillance were not incorporated in the agent's affidavit supporting the issuance of the September warrant.

Scherer's assertions regarding this incident amount to little more than speculation. The mere allegation that the observation might have been in violation of the Fourth Amendment is not enough to show that Scherer is entitled to the extraordinary relief he seeks here. His new evidence fails to demonstrate that his conviction amounted to "a complete miscarriage of justice." *Hedman*, 655 F.2d at 815.

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[7] The Seventh Circuit has held that the Fourth Amendment protects the home and the area within 75 feet of the home. *United States ex rel. Saiken v. Bensinger*, 546 F.2d 1292, 1297 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977).

VI.

Scherer also contends that a BATF agent violated his Fourth Amendment rights when the agent came onto his property on two occasions in September, posing as a cousin of the informer he accompanied. Scherer had invited the informer and his "cousin Jim Moore" onto the property to build duck blinds. On both occasions, once the two were on Scherer's farm, they were given broad permission by Scherer's wife to look around the grounds and in the barn for wood to build the duck blinds.

The agents were on Scherer's property by his express permission. A government agent may obtain an invitation onto property by misrepresenting his identity, and if invited, does not need probable cause nor warrant to enter so long as he does not exceed the scope of his invitation. *Lewis v. United States,* 385 U.S. 206, 212 (1966); *United States v. Glassel,* 488 F.2d 143, 145 (9th Cir. 1973); *Scherer III,* 74 CR 99 at 9. Here, the agents were invited onto the property and there is no proof that they exceeded the scope of their invitation. The fact that the agents were aware before the visit that the two Thompson submachine guns were lying in Scherer's barn does not take this case out of the consent exception to the Fourth Amendment's warrant requirement. This is not a case where the agent entered with a warrant, knowing of and intending to search for items not described in the warrant, and continued to search after the enumerated items were seized, unlawfully exceeding the scope of the warrant. *See Lo-Ji Sales, Inc. v New York,* 442 U.S. 319 (1979). Nor is it a case where the agent obtained entry by consent and then went beyond the scope of that invitation to search unlawfully for incriminating evidence. *See Gouled v. United States,* 255 U.S. 298 (1921); *United States v. Dichiarante,* 445 F.2d 126 (7th Cir. 1971). Rather, as in *United States v. Griffin,* 530 F.2d 739 (7th Cir. 1976), the agent here had reason to believe that evidence was on the property and, after obtaining an invitation to enter the property, came across the evidence in plain view while acting within the bounds of the invitation. The fact that the permission to

search the property for wood was given by Scherer's wife, rather than by Scherer himself, does not change the result. *See United States v. Hendrix*, 595 F.2d 883 (D.C. Cir. 1979). The agent was lawfully on the property when he came across the two submachine guns in plain view.

VI.

For the foregoing reasons, the judgment of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Appendix 1B

Opinion by Judge Wood

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 26, 1982

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 81-1408 vs. ANTHONY SCHERER, JR., Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 74-CR-99 Judge James B. Parsons

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

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* The Honorable Wesley E. Brown, Senior District Judge of the United States District Court for the District of Kansas, is sitting by designation.

Appendix 1C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 1, 1982

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 81-1408 vs.

ANTHONY SCHERER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-CR-99
James B. Parsons, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Wesley E. Brown, Senior District Judge of the United States District Court for the District of Kansas, is sitting by designation.

Appendix 1D

STATEMENT OF

James L. Jorgensen, Special Agent
Bureau of Alcohol, Tobacco and Firearms,
Chicago, Illinois, made at
35 E. Wacker Drive, Chicago, Illinois, on
October 5, 1972.

On February 11, 1972, Special Agents Balkema, Gleba, Stieman and this Agent maintained a moving surveillance by automobile of a motor vehicle driven by George J. Rivard, IV, and containing a passenger known to me as Matthew Smytkowski. The surveillance was begun at approximately 6:00 p.m. and was discontinued at approximately 1:00 a.m., February 12, 1972.

The motor vehicle bearing Rivard and Matthew Smytkowski was observed to travel the following route and made the following stops:

> From Rivard's residence, Long Grove, Illinois, North on Illinois Route 83 to Route 22; Route 22 East to Riverwoods Road; Riverwoods Road North to Smytkowski residence; Stop at Smytkowski residence; From Smytkowski residence South on Riverwoods Road to Route 22; Route 22 West to Milwaukee Road, Half Day, Illinois; Stop at Foote's Tavern; South on Milwaukee Road one (1) block to Route 22; Route 22 West to Route 83; Route 83 South to Route 53; Route 53 Southwest to Route 68; Route 68 West to Route 72; Route 72 West to Gallagan Road; Gallagan Road North to Freeman Road; Freeman Road West to Anthony Scherer's driveway immediately West of Chicago Northwestern Railroad Tracks; North on Scherer's driveway; Stop.

The motor vehicle bearing Rivard and Smytkowski left the Scherer Farm at approximately 11:30 p.m. and traveled back to Smytkowski's home in Lake Forest, Illinois, where he left Rivard, and then Rivard travelled to his home in Long Grove, Illinois.

Appendix 2D

On March 25, 1972, Special Agents Balkema, Gleba, Stieman, and this Agent maintained a moving surveillance by automobile of a motor vehicle driven by Rivard. The vehicle was observed to leave the Rivard residence at approximately 4:00 p.m. The vehicle traveled the above-described route with the addition that it made a stop at a tavern in Gilberts, Illinois at the intersection of Route 72 and Gallagan Roads. This agent discontinued participation in the surveillance at approximately 5:15 p.m.

On September 20, 1972, acting in my capacity as a Special Agent, I entered property known to me as the Tony or Anthony Scherer farm, Gilberts, Illinois, at approximately 11:45 a.m. in the company of Rivard. Rivard and I pulled up to the farmhouse in Rivard's vehicle. At that time a female, identified to me as Liz Scherer came out of the house, and greeted us. Rivard stated that I was his cousin, Jim Moore, and that we had come to work on duck blinds as per our previous agreement with Tony Scherer. Liz Scherer stated that she was aware of our reason for coming and she invited us into the house for a soda. She then stated that Tony had expected us to come today, but was unexpectedly called away to paint a house. His instructions were that we should just go ahead with our work on the duck blinds without him and that he would probably be back about 4:00 p.m. After drinking the soda, Rivard asked Liz Scherer where the tools were and Liz stated that she didn't know but that we should look around the farm for ourselves. Rivard and I then left the kitchen of the farmhouse and proceeded to look around various parts of the farmyard and the barn, both upstairs and downstairs, for the tools necessary to construct the duck blinds. Rivard and I found the tools necessary and proceeded to work on the duck blinds. Within a short time however, we ran out of wood. Rivard went back to the farmhouse and asked Liz Scherer where we might find additional wood with which to construct the blinds. Liz stated, however, that she didn't know and she proceeded to lead us around various parts of the house including the attic in an attempt to find additional wood. She then lead us outside the house to various parts of the barn in a search for wood. Liz Scherer then suggested that we look around for ourselves and use whatever wood we could find.

Then Rivard and I began to look in various rooms and parts of the Scherer barn for the necessary wood. While in the process of looking for wood, I noticed the barrels and foregrips of what appeared to be two (2) Thompson machine guns protruding from a stack of boxes in one of the rooms of the barn. I approached the two guns and looked down at what appeared to be two (2) Thompson machine guns. One gun had what appeared to be home made parts. I examined both machine guns and was able to determine that there were no serial numbers on either gun. The first gun appeared to be a military model, Thompson, .45 caliber machine gun, and the second to be a civilian model Thompson .45 caliber machine gun, with home made parts. The military model had a wooden bolt and the civilian model had home made shiny metal parts on the trigger housing. Neither gun had serial numbers on it. We continued to work on the duck blinds and left the Anthony Scherer farm at approximately 1:00 p.m.

On September 23, 1972, I again entered property known to me as the Anthony Scherer farm, Gilberts, Illinois, in the company of Rivard. We went into the farmhouse and were greeted by a female known to me as Liz Scherer. Rivard stated that we had come to try a little hunting and to continue to work on the duck blinds. Rivard and I got our shotguns and went out into one of the nearby fields. I discovered that the firing pin on my shotgun was broken so we went back to the farmhouse. Liz Scherer stated that I could use one of her husband's Tony's, shotguns. I took that shotgun and went to the field in an attempt to hunt. We later returned to the farmhouse, replaced the gun, and stated to Liz Scherer that we were going to continue work on the duck blinds. Liz Scherer stated that we should look around for the wood and to help ourselves to the tools. We began to work on the duck blinds and Liz Scherer came out of the house with her two children. She stated that she wanted to go to the store as per a previous agreement. Rivard said to me that he was going to take her. Liz Scherer stated to me that if the phone rang I should go into the house, answer it, and take a message. Rivard, Liz Scherer and her two children then departed in Rivards vehicle at

approximately 12:00 noon. At that time I continued to work on the duck blinds, and in the process of looking for more wood, I noticed that barrels of the two Thompsons which I had seen on September 20, 1972, were still in the same position as I had left them on that date. Rivard, Liz Scherer and her children returned at approximately one half hour later, at 12:30 p.m. I was in the house at the time of their return having taken a message from the telephone. I stated to Liz Scherer that there was a gentleman on the phone interested in buying one of her kittens. She thanked me and went in to take the telephone call. She then requested that I carry her baby into the house, which I did. I returned to the outside and continued working on the blinds with Rivard. At approximately 1:00 p.m., the two of us drove around the neighboring fields in search for game, after which at approximately 1:15 p.m. Rivard went into the Scherer farmhouse and stated that we were going to leave. At 1:15 p.m., we departed the Anthony Scherer farm.

On October 4, 1972 I was acting in my capacity as Special Agent, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, and participated in the execution of a Federal Search Warrant for the premises known to me as the Tony or Anthony Scherer farm, Gilberts, Illinois.

I entered the property at approximately 7:10 a.m. in the company of other Special Agents of the Bureau of Alcohol, Tobacco and Firearms and officers of the Illinois State Police. Special Agent Stieman went to the rear door of the Scherer farmhouse, identified himself as a Federal Agent, and proceeded to state in a loud voice that he was in possession of a Federal Warrant to search the premises. Agent Stieman and I entered the farmhouse and were confronted by a screaming female known to me as Liz Scherer. Agent Stieman and I proceeded to go to the second floor where I saw and heard Agent Daniel Hartnett state to Anthony Scherer that he was under arrest for violation of the Gun Control Act of 1968. I saw and heard Agent Hartnett advise Scherer of his Constitutional Rights. Scherer stated that he had his attorney on the telephone and advised his attorney that he was being advised of his Rights. I heard Scherer state that he understood his Rights.

Appendix 5D

At approximately 8:00 a.m. on October 4, 1972 I left the Scherer farm in the company of Special Agents Gleba, Balkema and Borcia. We proceeded to 1816 N. Milwaukee, Avenue, Chicago, Illinois where I saw and heard Agent Borcia state to Matthew Smytkowski that he was under arrest for violation of the Gun Control Act of 1968. I saw and heard Agent Borcia advise Smytkowski of his Constitutional Rights, and heard Smytkowski state that he understood those Rights. Smytkowski was transported to the Bureau of Alcohol, Tobacco and Firearms Crime Laboratory, and then to the United States Marshall's Lockup. At approximately 1:00 p.m. Smytkowski appeared before Magistrate James Balog and was released on an OR Bond in the amount of $5,000.00.

On October 12, 1972, while assigned to a protection detail at Rivard's residence in Halfday, Illinois with Agent Balkema, Smytkowski came to Rivard's house to pick-up some phonograph records and a saddle. Agent Balkema admitted Smytkowski into the house, however, cautioned him not to say anything regarding his recent arrest. When in the house and after receiving his records and saddle, Smytkowski stated that he would like a share of the $30,000.00. I then advised Smytkowski of his Constitutional Rights, after which, he stated he understood. Agent Balkema and I then escorted Smytkowski from the house to his truck, where he again stated he wanted a share of the $30,000.00. Agent Balkema told him his statement was ridiculous, after which, Smytkowski commented that for $5,000.00 he would help the "G" get Tony Scherer. Smytkowski stated that he needed the money to pay his "shyster" lawyer with. Agent Balkema advised Smytkowski that he would forward his offer to the Assistant United States Attorney.

James L. Jorgensen
Special Agent

Appendix 1E

1

[redacted]

James L. Jorgensen, Special Agent
Bureau of Alcohol, Tobacco & Firearms,
Chicago, Illinois, made at
35 E. Wacker Drive, Chicago, Illinois, on
[redacted]
OCTOBER 5, 1972

On December 28, 1971, Special Agents [redacted] Balkema, [redacted] Stieman, and this Agent delivered to the ROB Unit, United States Army, Fort Sheridan, Illinois, the (2) K-18 Sniper Grenades.

On February 11, 1972, Special Agents Balkema, Gleba, Stieman, and this Agent maintained a moving surveillance by automobile of a motor vehicle driven by a Confidential Informant, and containing a passenger known to me as Matthew Szytkowski. The surveillance was begun at approximately 4:00 p.m. and was discontinued at approximately 1:00 a.m., February 12, 1972.

The motor vehicle bearing [redacted] EVANS and Matthew Szytkowski was observed to travel the following route and make the following stops:

From Confidential Informant's EVANS residence, Long Grove, Illinois, north on Illinois Route 83 to Route 22; Route 22 east to Riverwoods Road; Riverwoods Road north to Szytkowski residence; Stop at Szytkowski residence; From Szytkowski residence south on Riverwoods Road to Route 22; Route 22 west to Milwaukee Road, Half Day, Illinois; Stop at Foote's Tavern; South on Milwaukee Road one (1) block to Route 22; Route 22 west to Route 83; Route 83 south to Route 53; Route 53 southwest to Route 68; Route 68 west to Route 72; Route 72 west to Gallagan Road; Gallagan Road north to Freeman Road; Freeman Road west to Anthony Scherer's driveway immediately west of Chicago Northwestern Railroad Tracks; North on Scherer's driveway; Stop.

The motor vehicle bearing [redacted] EVANS and Szytkowski left the Scherer Farm at approximately 11:3[redacted] and traveled the exact reverse of the above-described route without making the stop at Foote's Tavern, Half Day, Illinois.

On March 25, 1972, Special Agents Balkema, Gleba, Stieman, and this Agent maintained a moving surveillance by automobile of a motor vehicle driven by a Confidential Informant and containing a passenger known to me as Matthew Szytkowski. The vehicle was observed to leave the Confidential Informant's [redacted] residence at approximately 4:00 p.m. The vehicle traveled the above-described route with the addition that it made a stop at a tavern in Gilberts, Illinois, at the intersection of Route 72 and Gallagan Roads. This Agent discontinued participation in the surveillance at approximately 5:15 p.m.

James L. Jorgensen
Special Agent

Appendix 2E

2

STATEMENT OF:

James L. Jorgenson, Special Agent, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, make at Chicago, Illinois on September 20, 1972.

~~I have been employed as a Special Agent, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, since June 1, 1971.~~ On September 20, 1972, acting in my capacity as a Special Agent, I entered property known to me as the Tony or Anthony Scherer farm, Gilberts, Illinois, at approximately 11:45 a.m. in the company of ~~a Confidential Informant~~ RIVARD ~~Confidential~~ Informant and I pulled up to the farmhouse in the ~~Confidential~~ vehicle. At that time, a female, identified to me as Liz Scherer came out of the house, and greeted us. ~~The Confidential Informant~~ stated that I was his cousin, Jim Moore, and that we had come to work on duck blinds as per our previous agreement with Tony Scherer. Liz Scherer stated that she was aware of our reason for coming and she invited us into the house for a soda. She then stated that Tony had expected us to come today, but was unexpectedly called away to paint a house. His instructions were that we should just go ahead with our work on the duck blinds without him and that he would probably be back about 4:00 p.m. After drinking the soda, ~~the Confidential Informant~~ asked Liz Scherer where the tools were and Liz stated that she didn't know but that we should look around the farm for ourselves. ~~The Confidential Informant~~ and I then left the kitchen of the farmhouse and proceeded to look around various parts of the farm yard and the barn, both upstairs and downstairs, for the tools necessary to construct the duck blinds. ~~The Confidential Informant~~ and I found the tools necessary and proceeded to work on the duck blinds. Within a short time, however, we ran out of wood. ~~The Confidential Informant~~ went back to the farmhouse and asked Liz Scherer where we might find additional wood with which to construct the blinds. Liz stated, however, that she didn't know and she proceeded to lead us around various parts of the house including the attic in an attempt to find additional wood. She then lead us outside the house to various parts of the barn in a search for wood. Liz Scherer then suggested that we look around for ourselves and use whatever wood we could find. The ~~Confidential Informant~~ RIVARD and I began to look in various rooms and parts of the Scherer barn for the necessary wood. While in the process of looking for wood, I noticed the barrels and foregrips of what appeared to be two (2) Thompson machine guns protruding from a stack of boxes in one of the rooms of the barn. I approached the two guns and looked down at what appeared to be two (2) Thompson machine guns. One gun had what appeared to be home made parts. I examined both machine guns and was able to determine that there were no serial numbers on either gun. The first gun appeared to be a military model, Thompson, 45 caliber machine gun, and the second appeared to be a civilian Model Thompson 45 caliber machine gun, with home made parts. The military model had a wooden bolt and the civilian model had home made shiny metal parts on the trigger housing. Neither gun had serial numbers on it. We continued to work on the duck blinds and left the Anthony Scherer farm at approximately 1:00 p.m.

Appendix 3E

On September 21, 1972, I again entered property known to me as the Anthony Scherer farm, Gilberts, Illinois, in the company of a Confidential Informant. We went into the farmhouse and were greeted by a female known to me as Liz Scherer. The Confidential Informant stated that we had come to try a little [illegible] and to continue work on the duck blinds. The Confidential Informant and I got our shotgun and pin on my shotgun was broken so we went back to the farmhouse. Liz Scherer stated that I could use one of her husband's, Tony's, shotguns. I took that shotgun and went to the field in an attempt to hunt. We later returned to the farmhouse, replaced the gun, and stated to Liz Scherer that we were going to continue work on the duck blinds. Liz Scherer stated that we should look around for the wood and to help ourselves to the tools. We began to work on the duck blinds and Liz Scherer came out of the house with her two children. She stated that she wanted to go to the store as per a previous agreement. The Confidential Informant said that he was going to take her. Liz Scherer stated to me that if the phone rang I should go into the house, answer it, and take a message. The Confidential Informant and Liz Scherer and her two children then departed in the Informant's vehicle at approximately 12:00 noon. At that time I continued to work on the duck blinds and in the process of looking for more wood, I noticed that barrels of the two Thompsons which I had seen on September 20, 1972, were still in the same position as I had left them on September 20, 1972. The Confidential Informant, Liz Scherer, and her children returned at approximately one half hour later, at 12:30 p.m. I was in the house at the time of their return having taken a message from the telephone. I stated to Liz Scherer that there was a gentleman on the phone interested in buying one of her kittens. She thanked me and went in to take the telephone call. She then requested that I carry her baby into the house, which I did. I returned to the outside and continued working on the blinds with the Confidential Informant. At approximately 1:00 p.m. the Confidential Informant and I drove around the neighboring fields in search for guns, after which at approximataly 1:15 p.m., the Confidential Informant went into the Scherer farmhouse and stated that we were going to leave. At 1:15 p.m., we departed the Anthony Scherer farm.

James L. Jorgensen
Special Agent, BATF

Appendix 4E

3

STATEMENT OF

James L. Jorgensen, Special Agent, Bureau of Alcohol, Tobacco & Firearms, Chicago, Illinois, made at Chicago, Illinois on October 5, 1972.

On October 4, 1972 I was acting in my capacity as Special Agent, Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms, and participated in the execution of a Federal Arrest Warrant for Anthony Scherer, and a Federal Search Warrant for the premises known to me as the Tony or Anthony Scherer farm, Gilberts, Illinois.

I entered the property at approximately 7:10 a.m. in the company of other Special Agents of the Bureau of Alcohol, Tobacco & Firearms and Officers of the Illinois State Police. Special Agent Stiehm went to the rear door of the Scherer farmhouse, identified himself as a Federal Agent, and proceeded to state in a loud voice that he was in possession of a Federal warrant to search the premises. Agent Stiehm and I entered the farmhouse and were confronted by a screaming female known to me as Liz Scherer. Agent Stiehm and I proceeded to go to the second floor where I saw and heard Agent Daniel Hartnett state to Anthony Scherer that he was under arrest for violation of the Gun Control Act of 1968. I saw and heard Agent Hartnett advise Scherer of his Constitutional Rights. Scherer stated that he had his attorney on the telephone and advised his attorney that he was being advised of his Rights. I heard Scherer state that he understood his Rights.

At approximately 9:00 a.m. on October 4, 1972 I left the Scherer farm in the company of Special Agents Gleba, Balkema and Borcia. We proceeded to 1616 N. Milwaukee Avenue, Chicago, Illinois where I saw and heard Agent Borcia state to Matthew Smytkowski that he was under arrest for violation of the Gun Control Act of 1968. I saw and heard Agent Borcia advise Smytkowski of his Constitutional Rights, and heard Smytkowski state that he understood those Rights. Smytkowski was transported to the Bureau of Alcohol, Tobacco & Firearms Crime Lab, and then to the United States Marshall's lockup. At approximately 1:00 p.m. Smytkowski appeared before Magistrate James Balog and was released on an OR Bond in the amount of $5,000.

James L. Jorgensen
Special Agent

Appendix 1F

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

30 JUL 1979

Honorable S. I. Hayakawa
United States Senate
Washington, D. C. 20510

Dear Senator Hayakawa:

This is in reference to your letter of May 10, 1979, wherein you requested our comments on the abuses referred to in the article attached to your letter entitled "BATF Entrapment Schemes" by David T. Hardy.

The first portion of Mr. Hardy's article discusses "straw man entrapment" or the straw purchase. We emphasize that it is not the practice of ATF to conduct an undercover investigation regarding unlawful sales by firearms licensees unless there is reason to believe that the licensee has previously made unlawful sales. If the firearms licensee is reluctant to deal with the undercover agent, ATF immediately terminates its investigation. Furthermore, it is the Bureau's practice to permit the firearms licensee himself to suggest the medium of a straw purchaser to consummate the sale.

Thus, it is strictly prohibited for ATF undercover agents to encourage, as opposed to merely provide the opportunity for, such unlawful sales of firearms. In all instances, ATF agents seek to comply with the rules laid down by the Supreme Court concerning entrapment. In United States v. Russell, 411 U.S. 433, 435–436 (1973), the United States Supreme Court ruled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. It is only when the Government's deception actually implants

the criminal design in the mind of the defendant that the defense of entrapment comes into play. Of course, any defendant having been unlawfully entrapped into commission of a crime has a valid defense to the prosecution.

The use of straw purchasers in acquiring firearms from licensees presents a serious law enforcement problem. These transactions thwart the intent of the Gun Control Act to keep firearms out of the hands of prohibited persons, as well as to regulate interstate commerce in firearms. Typically, the actual or ultimate purchaser is a felon or out-of-State resident to whom a licensee is prohibited from selling or delivering firearms. By utilizing a straw purchaser, who is himself eligible to obtain firearms, the prohibited person is able to acquire the firearm "off record" and conceal the transaction. Firearms acquired in this manner are frequently used in crime. For example, the firearm used by David Berkowitz, also known as "Son of Sam," in the murder of several persons in New York was purchased from a licensed dealer in Texas by a Texas resident acting on Berkowitz's behalf.

While there is a continuing need to monitor straw purchase transactions, you may be interested in knowing that we have implemented internal controls to ensure that investigations of these cases are kept within proper limits and that only those cases warranting Federal prosecution are investigated. That is to say, any such investigation must be personally approved by the Director or the Deputy Directory (the same is true with regard to investigations of firearms transactions at gun shows).

Furthermore, we are seeking to impact upon the problem of straw purchases by informing all licensees how to avoid those transactions which are contrary to law. A publication serving this purpose will be issued within the next few days.

In his article, Mr. Hardy alleges a second form of entrapment entitled "implied dealership" which he claims is used against collectors and those displaying firearms at gun shows. Under Federal firearms laws, a nonlicensed resident of the State in

which the show is being held may buy, sell or exchange personal firearms with another nonlicensee of the same State. The resident may also sell to or place an order to buy firearms with a licensed firearms dealer, provided the resident does not "engage in the business" of dealing in firearms which requires a license under the Gun Control Act of 1968. Although the term "engaged in business" is not defined by statute, the courts have had no difficulty construing the term and have generally held it to mean an activity which occupies one's time, attention and labor for the purpose of livelihood or profit. While an actual profit from the sales of firearms need not be proved, a willingness to deal, a profit motive and a greater degree of activity than occasional sales by a hobbyist must be shown for purposes of a conviction. Thus, a nonlicensed resident may make an occasional sale as a hobbyist at a gun show or an individual may dispose of a gun collection at a gun show. However, if the nonlicensed person is acquiring firearms for the purpose of resale and the activities otherwise constitute engaging in a firearms business as discussed above, a violation of law would result. In investigations of such activities, ATF adheres to the rules concerning entrapment.

As a third form of entrapment, Mr. Hardy alleges that ATF agents approach a Federally licensed dealer and persuade the dealer to sell some privately owned firearms without making a record of the transaction. ATF's efforts are directed at those licensees who, as a part of their business, at or away from their licensed premises sell firearms to ineligible purchasers and fail to record the transaction as a means of concealment. We reiterate that ATF agents, in making such investigations are mindful of the law of entrapment.

ATF recognizes that a licensee may maintain a private collection of firearms independent of the business inventory and lawfully dispose of such firearms without entering the transaction in the licensee records. As stated in ATF Industry Circular 72–30, a licensee who uses the firearms license to obtain personal firearms must record in the business records

the acquisition and disposition. Such firearms may be kept on the licensee's business premises for purposes of display or decoration and not for resale as long as they are segregated from the business inventory by appropriate identification. The licensee's subsequent sale of such personal firearms need not be recorded in the business records and a form 4473 executed by the purchaser would not be required.

With respect to Mr. Hardy's discussion of "Dewat Entrapment," the term "Dewat" technically denotes war trophy firearms that were deactivated under a program inaugurated in 1945 to permit returning servicemen to register their trophies. under the National Firearms Act so that they could be retained. However, we construe Mr. Hardy's discussion as pertaining to any and all inoperable or unserviceable machineguns, including "Dewats."

The National Firearms Act (26 U.S.C., Chapter 53) requires, among other things, the registration of machineguns and the payment of taxes on transactions in such weapons. The term "machinegun" is defined by the Act to include any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term also includes a machinegun frame or receiver alone. It should also be noted that an unserviceable machinegun (one that cannot be readily restored to an operable condition) is still a machinegun within the scope of the Act. Consequently, Mr. Hardy's inference that inoperable or unserviceable machineguns should not be held to be National Firearms Act weapons is wholly without merit.

The 1968 amendments to the National Firearms Act provided a 30-day amnesty period during which previously unregistered weapons could be registered by their possessors with impunity. Thereafter, only those weapons already registered and those registered pursuant to being lawfully made could be legally possessed or transferred. In short, a person in possession of an unregistered machinegun today cannot legitimize his pos-

session of the weapon. The unregistered weapon is contraband and subject to seizure or abandoned to the Government. We would add that where the possessor's violation is nonwillfull, criminal prosecution is not undertaken.

Mr. Hardy's discussion of practice grenades relates to the category of National Firearms Act weapons termed "destructive devices." In part, this term includes explosive bombs, grenades or similar devices. He cites the ATF case reported as United States v. Kilivan, 456 F.2d 555 (8th Cir. 1972), which, he infers, was erroneously decided. The court in Kiliyan held that certain M-21 practice grenades were destructive devices for purposes of the National Firearms Act. Subsequent to the decision in Kiliyan, other courts held that the M-21 practice grenade and other items designed by the military establishment for training or practice purposes did not constitute National Firearms Act weapons since devices which were neither designed nor redesigned for use as weapons were excluded from the term destructive device. Adhering to the weight of authority, ATF reversed its position and no longer considers such devices in their original configuration as National Firearms Act weapons.

In his heading entitled "Other Techniques," Mr. Hardy depicts a less than accurate situation regarding two-hand grip "silhouette" pistols. He states that ATF issued a "special" regulation under the National Firearms Act so as to bring such weapons within the scope of the Act for prosecution purposes. We disagree. This regulation defining "pistol" was added to the Code of Federal Regulations on August 3, 1971, or approximately six years before silhouette pistols came into the limelight. Some of these weapons now technically fall within the Act's definition of firearm; however, we know of no prosecution under the Act regarding a silhouette pistol. During the last 2 years, a number of manufacturers of silhouette pistols have sought and obtained ATF's advice and counsel regarding the proper design to be employed in manufacturing these firearms so that they would not be included within the coverage of the Act.

Appendix 6F

Honorable S. I. Hayakawa

We trust that this has been responsive to your inquiry. If we can be of further assistance in any way, please let us know.

Sincerely yours,

John G. Krogman
Acting Director

that if under a ruse you search and then – but you don't seize –– and then you go in and get a search warrant on the basis of the ruse, isn't that a violation of the Fourth Amendment?

MR THORNTON: I don't think so, your Honor. I think that there is actually a balancing of interests that goes on. In some respect there is a right to privacy here, on the part of Mr. Scherer against any type of entry, but on the other hand there is the right of the agents to make investigations.

JUDGE SWYGERT: Well, do you have any –– oh, I am sorry. Go ahead.

MR. THORNTON: And it's the purpose of the Court who is reviewing this situation, or a magistrate who is reviewing the situation, to balance the competing interests that are involved the right of privacy of the individual versus the ability of these agents to make their investigations, or to continue their investigations.

JUDGE SWYGERT: That's a new theory of Fourth Amendment, I believe, but, anyway, do you have any cases that will support your view that a ruse used to –– for a search, to get information as the basis for a search warrant and not pick up the contraband at the time of the search, invalidates the warrant?

MR. THORNTON: We would rely on the cases that we cited in the brief.

JUDGE SWYGERT: Lewis.

MR. THORNTON: That's correct, plus the Hoffa case and

Appendix 1H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY J. SCHERER, JR., Petitioner,	)	
v.	)	No. 74 CR 99
UNITED STATES OF AMERICA, Respondent.	)	

MEMORANDUM OPINION AND ORDER

Petitioner Anthony Jr. Scherer, Jr., moves that this court grant an order vacating the judgment and sentence entered upon his convictions for violations of the Gun Control Act of 1968, 18 U.S.C. § 922(n). The motion is denied.

I.

On January 31, 1974, a federal grand jury returned an eleven count indictment charging that Scherer, as a dealer in firearms, knowingly and unlawfully failed to record the disposition of certain firearms in violation of Title 18, United States Code, Section 922(n) (counts one through nine and eleven). The indictment also charged that Scherer knowingly received and possessed a certain firearm not registered to him in violation of 26 U.S.C. § 5861(d) (count ten).

On November 4, 1974, the defendant waived his right to trial by jury and proceeded to an eleven day bench trial before this court. On November 19, 1974 the court entered a finding of guilty on counts one through nine and not guilty on count eleven. Count ten was previously dismissed. The court sentenced Scherer to a term of two years in custody on each of counts one through nine to be served concurrently. The United States Court of Appeals for the Seventh Circuit affirmed the conviction. United States v. Scherer, 523 F.2d

371 (7th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

In March of 1976 this court reviewed Scherer's motion for a reduction of sentence and reduced the sentence to seven months in custody followed by three years probation. In May, 1976, this court again granted defendant's motion for a second reduction of sentence, and reduced the period in custody to time served.

In July, 1978, defendant filed a petition for habeas corpus relief on three grounds: (1) that his Sixth Amendment right to adequate representation was violated by an alleged conflict of interest on the part of his retained counsel; (2) that his Fifth Amendment right to due process was violated by the government in knowingly permitting false or perjured testimony by their informant witness and by wilfully refusing to disclose evidence favorable to the defendant; and (3) that the government employed illegal electronic surveillance against him in violation of his Fourth Amendment rights. On December 18, 1978, this court found each of these grounds to be without merit and denied the petition. The United States Court of Appeals for the Seventh Circuit affirmed. United States vs. Scherer, No. 79–1342 (7th Cir. May 21, 1980).

II.

Petitioner moves that this court vacate the judgment and sentence. He bases his claim for relief on four possible sources: (1) Title 28 United States Code, Section 1651, (2) Rule 35 of the Federal Rules of Criminal Procedure, (3) writ of error coram nobis, or (4) Title 28 United States Code, Section 2255.

Title 28 United States Code, Section 2255 is inapplicable because petitioner fails to satisfy the custody requirement. He has finished both his sentence and his period of probation. Ansourian v. United States, 240 F.Supp. 864 (D.C. N.Y. 1965), cert. denied 383 U.S. 949 (1966).

Rule 35 of the Federal Rules of Criminal Procedure is not applicable to this situation because Rule 35 has been construed "(t)o permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings

prior to the imposition of sentence." Hill v. United States, 368 U.S. 424, 430, (1962). Petitioner does not claim that his sentence was not in conformity with the statute under which he was convicted. Also petitioner has not complied with the 120 day time period for filing under Rule 35(b).

Finally, petitioner seeks relief under Title 28 United States Code, Section 1651 which states that "(t)he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." A writ of corum nobis is authorized and available under section 1651. Therefore, petitioner's motion for a common-law writ of error corum nobis properly invokes the jurisdiction of a district court to set aside a judgment of conviction, even where a sentence has been fully served.

A writ of error corum nobis is an extraordinary remedy, and it is to be used only under circumstances compelling such action to achieve justice. It is ordinarily available to correct errors of fact which are of a fundamental character. Any proceeding which is challenged by a writ of error is presumed to be correct and the burden rests on petitioner to show otherwise. United States v. Morgan, 346 U.S. 502 (1954). The petitioner must show the existence of factual errors which, if known, would have achieved a contrary result. United States v. Gross, 446 F. Supp. 948 (1978).

III.

Petitioner claims that, (1) material evidence in possession of the U.S. and its agents needed by him for his trial was denied him; (2) failure to discover this material prior to trial was not caused by petitioner, and this new material was discovered pursuant to discovery in a different case, U.S.A. v. Miscellaneous Firearms, Inc., etc., 74 C 877 in 1979; (3) that from this newly discovered evidence petitioner has learned the following:

(a) that U.S. agents entered his property in June or July, 1972 without a warrant;

(b) that information from this entrance was used in carrying out other searches on September 20 and 23, 1972;

(c) that evidence from these searches was used to obtain a search warrant for petitioner's home and property;

(d) that the search warrant was, therefore, obtained improperly and should be quashed and all evidence from it suppressed;

(e) that Exhibit 30 at trial was a "composite, sanitized" version of other documents not given to petitioner at his trial (See Appendices B and C, Petitioner's Brief);

(f) that other documents were made at the direction of the government for the purpose of investigating petitioner (eleven pages of handwritten notes of unknown authorship, See Appendix D, Petitioner's Brief) and these documents may show that a government witness, George Rivard, committed perjury; and finally,

(g) that petitioner was convicted of an act which the government now holds is not a violation of the law.

IV

Most of Petitioner's claims are cumulative and have been raised and reviewed at his trial, on direct appeal, or in his habeas corpus petition. Both this court and the Seventh Circuit Court of Appeals have ruled against Petitioner on some of the issues raised in his petition for writ of error corum nobis.

The claim that Exhibit 30 at trial was a "composite, sanitized" version is without merit. A close comparison of Exhibit 30 with the later discovered document shows only minor differences such as the name "Rivard" substituted for the words "Confidential Informant". Also it appears that more than one report of Special Agent Jorgensen was incorporated into the trial exhibit, and this could explain the date discrepancies. For whatever reason the earlier and the later documents differ, it is clear that there are no substantive differences which would have prejudiced petitioner at trial. The documents

impart the same information, and, in fact, Exhibit 30 contained the date discrepancy which could have been the subject of cross-examination at trial.

The court understands that the government in compliance with discovery did not give petitioner eleven pages of handwritten notes, and does not condone this. However, the court fails to see, and the petitioner does not point out, how the lack of these notes could have prejudiced him at trial. The notes appear to be descriptions of persons or their clothing, telephone numbers, a rough sketch of a map, and some miscellaneous notes written by an unknown author. Most of the notes do not have dates or names, so it is difficult to presume that all are even related to petitioner's case. Mr. Scherer contends that these notes may show that a government witness, George Rivard, committed perjury at trial when Rivard stated that he made no notes. (Trial transcript at page 502). However, Mr. Scherer offers no proof that the notes are Rivard's, and the Government points out that on page 574 of the trial transcript Rivard stated that he would report to government agents who recorded their impressions of his report. It is also worth noting that petitioner made the same charge of perjury against government witness, Rivard, in his petition for habeas corpus relief in 1978. This court rejected his argument in 1978, and the Court of Appeals for the Seventh Circuit affirmed. The Court of Appeals stated:

> Rivard testified at trial that after each meeting with the defendant, he would report to ATF agents who would record in handwritten form what he had told them concerning his contacts with defendant. These statements to the agents were compiled in a seven-page typewritten document which was tendered to Scherer's counsel prior to cross-examination . . . . (79–1342 at p. 4).

This court, therefore, finds that Appendix D to Petitioner's Motion for Relief is no basis for petitioner's charge of perjury or failure to disclose evidence.

Next, Mr. Scherer argues that he has been convicted of an act which the Government now holds is not a crime. This argument is totally unfounded. The letter which petitioner

relies upon to support this argument states that a federally licensed gun dealer may sell personal firearms without recording the sales in his business records. This "personal" versus "business" firearms distinction was raised by petitioner on direct appeal and was decided against him. The court in United States v. Scherer, supra, stated at 374, "(i)t is immaterial whether the weapons sold were originally acquired for Scherer's personal use or for business purposes. They became a part of his business inventory the moment they were placed on the market for resale." In United States v. Currier, No. 79–1242, decided March 25, 1980, the First Circuit relied on the above statement: "This holding (Scherer) is without a doubt correct, otherwise the federal regulations could be circumvented altogether by dealers who were slick enough to establish 'personal collections' for otherwise unlawful sales."

Finally, petitioner argues that the search warrant used to gather evidence against him was obtained illegally because the information used to obtain the warrant was obtained from prior illegal searches. This issue is the only one which petitioner raises which involves both new evidence and a legitimate question of whether fundamental errors of fact occurred at the trial which would render the proceeding itself irregular and invalid.

Petitioner bases his argument on Appendix A, a deposition of Agent David Balkema, which shows that federal agents had made observations from automobiles and at one time from a fixed observation post on Scherer's farm in June or July of 1972. Mr. Scherer believes this observation led to a later "search" by agents in September, 1972, and evidence from the later search enabled the agents to obtain a search warrant for petitioner's farm.

First, it is important to point out that on direct appeal the Seventh Circuit held that probable cause existed for issuance of the search warrant. The Court of Appeals based this holding on several factors:

> Rivard's charges that Scherer was selling firearms from his house was bolstered by the four purchases made at

> this location, three of which were made under Government surveillance. Prior to each purchase Rivard had been able to provide Government agents with the name, price, and model number of each weapon eventually sold. Finally Rivard's assertion that numerous weapons were lying about Scherer's house, and that Scherer was keeping two Thompson machine guns without serial numbers in a box in his barn was corroborated by two special agents who visited the defendant's farm prior to the search.

523 F.2d 371.

The Court of Appeals characterized the agents' visits to the farm prior to the search as "corroborating" evidence. Probable cause to obtain the warrant was not based solely on the agents' visits. However, assuming the June and September visits were a basis for the search warrant, the visits must be examined to determine if a Fourth Amendment violation occurred. It is clear that the September visits, in the first place, are not new evidence and are not properly raised for the first time as Fourth Amendment violations by writ of error corum nobis. Petitioner was aware of the "searches" since the case first went to trial. (See Trial Exhibit 30). Secondly, even if the September visits were properly raised for the first time now, it is clear that the agents were on Petitioner's property by his express permission. An officer may legitimately obtain an invitation into a house by misrepresenting his identify, and if invited, he does not need probable cause nor warrant to enter so long as he does not exceed the scope of his invitation. Lewis v. United States, 385 U.S. 206 (1966), United States v. Glassel, 488 F.2d 143 (9th Cir. 1973), cert. denied 416 U.S. 941 (1974). Here the agents were invited on to the property to build duck blinds and also invited to look around for wood. There is no proof that the agents exceeded the scope of this invitation.

Next petitioner argues that the search warrant was obtained illegally because new evidence shows that agents were on his property in June or July, 1972. This is the only relevant new evidence which petitioner presents in his lengthy list of claims. The argument that this evidence warrants that the judgment below be vacated is without merit.

Petitioner presents no evidence which indicates exactly where the agents were on his property. From the deposition of Investigator Balkema, though it is not clear, it appears that the agents set up an observation post on a single occasion which was west-northwest of Mr. Scherer's house. The agents seem to have been east of an open field somewhere near a line of trees. No distances are given in the deposition, but the deposition reveals that a railroad track lies west-northwest of the house, and the agents were "a considerable distance from the railroad tracks." (See Appendix A, iii).

The Fourth Amendment cannot be translated into a general constitutional "right of privacy." Katz v. United States, 389 U.S. 347 (1967). However, the Fourth Amendment undoubtedly protects private homes from warrantless governmental intrusions. It also extends to protect the "curtilage" around the home. "Curtilage" has been defined as "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling." United States v. LaBerge, 267 F. Supp. 686, 692 (D. Md. 1967). The Seventh Circuit has found that from most of the cases, a rule emerges: any outbuilding or area within 75 feet of the house is within the curtilage. United States ex rel. Saiken v. Bensinger, 546 F.2d 1292, 1297 (1976), cert. denied, 431 U.S. 930 (1977). But the Fourth Amendment may not extend to all lands which a person owns, because its protections are not based upon the laws of property and trespass. Instead the constitutional right is one of freedom from unreasonable searches and seizures. Whether a search is unreasonable depends on the facts and circumstances of each case. Cooper v. State of California, 386 U.S. 58 (1967).

In the instant case there was no invasion of the petitioner's home as in Payton v. New York, 445 U.S. 573 (1980), which petitioner cites. The question then is, should the Fourth Amendment extend to protect the area of Mr. Scherer's property which the evidence indicates was only somewhere "on my property." The Government states that perhaps the "open field" doctrine will apply here. We agree that this is an appropriate case to apply the doctrine. As the Supreme Court held in Hester v. United States, 265 U.S. 57, (1924), "the special

protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Id. at 59.

The evidence does not show that the observation post was closer than 75 feet from the house, and petitioner has failed to show that the search warrant issued on the basis of this observation. Therefore, petitioner has not presented any new evidence which is of such a fundamental nature as to render the prior proceedings in this case invalid.

The petition for writ of error corum nobis should be and is hereby denied.

ENTER:

JAMES B. PARSONS
United States District Judge

Dated: March 3, 1981